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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

Joseph B. Francer
Petitioner,
vs.
Lawrence M. Small, Secretary,
Smithsonian, et al.,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia

PETITION FOR WRIT OF CERTIORARI

Joseph Francer
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38 pp

QUESTIONS PRESENTED FOR REVIEW

WHETHER A GOVERNMENT WORKER MAY USE REASONABLE SPEECH ON THE JOB? IF IT IS PROTECTED BY THE CONSTITUTION AMENDMENT I.?

WHETHER A GOVERNMENT WORKER MAY PHOTOGRAPH SOMETHING ON PUBLIC DISPLAY AND USE THAT FOR PERSONAL AND PUBLIC USE? IF IT IS PROTECTED BY THE CONSTITUTION AMENDMENT I?

WHETHER A GOVERNMENT WORKER MAY USE A GOVERNMENT OWNED LIBRARY FACILITY DURING PUBLIC BUSINESS HOURS, IN ORDER TO READ ABOUT GOVERNMENT REGULATIONS, ART INFORMATION, JOB DESCRIPTIONS, AND THINGS THAT ARE OF PUBLIC CONCERN AND USE THAT INFORMATION FOR PERSONAL AND PUBLIC USE? IF IT IS PROTECTED BY THE CONSTITUTION AMENDMENT I.?

IN CONSIDERING USE OF SPEECH, PHOTOGRAPHING, READING; HOW THESE MIGHT BE RELATED TO THE TITLE VII OF 42 U.S.C. 2000A, 2000E-2 TO 16, AND CONSTITUTIONAL ARTICLE AMENDMENTS I AND XIV? IF THE COURTS INTERPRETED THE LAWS PROPERLY? IF THERE ARE VIOLATIONS?

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i.
TABLE OF CONTENTS..... ii.
TABLE OF AUTHORITIES..... iv.
OPINIONS BELOW..... 1.
JURISDICTION..... 1.
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 2.
STATEMENT OF THE CASE..... 2.
REASONS FOR GRANTING THE WRIT..... 5.

I.
WHETHER A GOVERNMENT WORKER MAY USE REASONABLE SPEECH ON THE JOB? IF IT IS PROTECTED BY THE CONSTITUTION AMENDMENT I.?..... 5.

II.
WHETHER A GOVERNMENT WORKER MAY PHOTOGRAPH SOMETHING ON PUBLIC DISPLAY AND USE THAT FOR PERSONAL AND PUBLC USE? IF IT IS PROTECTED BY THE CONSTITUTION AMENDMENT I.?..... 6.

III.

WHETHER A GOVERNMENT WORKER MAY USE A GOVERNMENT OWNED LIBRARY FACILITY, DURING BUSINESS HOURS, IN ORDER TO READ ABOUT GOVERNMENT REGULATIONS, ART INFORMATION, JOB DESCRIPTIONS, AND THINGS THAT ARE OF PUBLIC CONCERN AND USE THAT INFORMATION FOR PERSONAL AND PUBLIC USE? IF IT IS PROTECTED BY THE CONSTITUTION AMENDMENT I?..... 7.

IV.

IN CONSIDERING USE OF SPEECH, PHOTOGRAPHING, AND READING; HOW THESE MIGHT BE RELATED TO TITLE VII 42 U.S.C. 2000A, 2000E-2 TO 16, AND CONSTITUTIONAL ARTICLE AMENDMENTS I AND XIV? IF THE COURTS INTERPRETED THE LAWS PROPERLY? IF THERE ARE VIOLATIONS?..... 8.

CONCLUSION ..... 14.
INDEX TO APPENDIX ..... ai.

TABLE OF AUTHORITIES

Barnes v. Costle 561 F. 2d 983 (D.C. Cir 1977)... 12.
Chester Collier v. Mary Lou Bachman 421 F. Supp. 869 (1976) U.S. DC. Mich..... 8.
Cox v. State of Louisana 379 U.S. 536 (1965)..... 5.
Doris Daniel v. Euell Paul 395 U.S. 298 (1969) ..... 9.
Faragher v. City of Boca Raton 118 U.S. 2275 (1998) 12.
Henry Segar v. B. Civilette 508 F. Supp. 690 (D.C. Cir 1981)..... 13.
Hishon v. King & Spalding 467 U.S. 69 (1984)..... 9, 11
Lovell v. City of Griffin Ga. 303 U.S. 444 (1938)..... 7.
McDonald v. Santa Fe Trail Trans Co. 427 U.S. 273 (1976)... 11.
McDonnell Douglas Co. v. Green 411 U.S. 792 (1973) 11.
Parker v. Baltimore & O.R. Co. 652 F. 2d 1012 (D.C. Cir 1981)... 12.
Perry v. Sinderman 408 U.S. 593 (1972).... 5.
Sandra Bundy v. Jackson 205 U.S. App D.C. 444 (1981) 12.
Stroller v. Marsh 682 F 2d 971 D.C. Cir (1982)... 13.
Terminiello v. City of Chicago 337 U.S. 1 (1949)... 6.
Winters v. People of State of New York 333 U.S. 507 68 S. Ct. 665 (1948)... 6.

Other Authorities

Federal Rules of Civil Procedure 56F..... 5, 13
U.S.C. 42 § 2000a 2, 9
U.S.C. 42 § 2000e-2 ..... 2, 9, 10, 12
U.S.C. 42 § 2000e-3 ..... 2, 10, 12
U.S.C. 42 § 2000e-16 ..... 2, 10, 12
United States Constitution, First Amendment ... 5-9
United States Constitution, Fourteenth Amendment 10, 11, 13

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The order of the United States Court of Appeals for the District of Columbia Circuit denying certificate of appeal is unpublished, and is found in Appendix at p.1. The Order of the Court of Appeals denying Petition for Rehearing and or for Rehearing En Banc, is found in the Appendix at p.12. The decision of the United States District Court for the District of Columbia is unpublished, and is found in the Appendix at p. 3. The Order of the District Court for the District of Columbia, denying motion for leave to take discovery is found in the Appendix at p.13.

JURISDICTION

This Honorable Court's jurisdiction is invoked by Title 28.U.S.C. § 1254 and pursuant to Supreme Court Rules 10.1 (a) and (c), and Rule 13 (1) and (4). The United States Court of Appeals for the District of Columbia entered judgment on Mar. 15, 2001. Petitioner timely filed a Petition for Rehearing, which the District of Columbia Circuit denied on May 25, 2001. Pursuant to Rule 13.1 and Rule 13.3 of Supreme Court Rules, this petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the First and Fourteenth Amendments to the United States Constitution as stated at Appendix p. 15.

This case concerns Title VII of 42 U.S.C. § 2000a, and 2000e-2 to 16 Unlawful Employment Practices as stated at Appendix p. 15-18
This case concerns the provisions of Federal Rules of Civil Procedure 56 F and stated at Appendix p. 18.

STATEMENT OF THE CASE

Petitioner, Joseph B. Francer, seeks review of the orders of the courts from the District of Columbia Circuit, denying appellate review.

In April 3, 1996, Mr. Francer encountered a group of individuals while he was working at the Renwick Gallery. He requested the visitor's children to sit on a bench because they were lying on the floor. A disagreement was presented by the visitor. Mr. Francer insisted that there were rules of behavior and an enigma came up if the visitor understood that was needed to be done. Mr. Francer asked the visitor if they were immigrants. The visitor became more angry and filed a complaint. Ricardo Weaver, a supervisor, proposed a ten days suspension for having asked that question. After negotiations there was a five days suspension.

In August 28, 1996, while Mr. Francer was on his free time, he went to the permanent collection on public display at the Renwick Gallery and photographed a few things. He was charged by Ricardo Weaver for having photographed. He was again suspended because of breaking museum rules, for a week in December 1996.

A memo was issued by the guard supervisors Avery Stichberry and Ricardo Weaver that the Renwick Gallery's library was not to be used for a break area; meaning to lounge there and have a meal. This was also encouraged by curator in charge Kenneth Trapp. In April 1997, while on his free time, Mr. Francer was reading in the Renwick Gallery's library. Then he was told by a supervisor to leave. April 3, 1997, Ricardo weaver proposed a suspension for having used library, and he was suspended for ten days in May 13, 1997.

Mr. Francer had made requests to use facilities, for health reasons, as drinking fountain, rest room, during his work time. This request was needed so work area was watched at all times. Francer's supervisors have at times refused leave for services, claiming they were busy working on a project. Francer has written a complaint to his employer and verbally to supervisors. Francer observed that other workers had free use of facilities without complaints. These adverse acts happened about the same time when Francer had a problem with a visitor's children and verbal comment April 3, 1996.

Petitioner complained of poor job performance ratings based on discrimination. In the periods before 4-1-1995 and after 3-31-1997 he received satisfactory work ratings. In the periods when Ricardo Weaver was

supervisor 4-1-1995 to 3-31-1997, Petitioner was rated for improvement needed. Petitioner observed other workers not performing well and misbehaving on the job yet they received inflated job ratings.

Petitioner had requested to use office telephone to call EEO in April 1996 to report on a protected activity namely the refusal of the use of facilities. The supervisors refused petitioner the use of phone.

August 9, 1996, Ricardo Weaver assaulted petitioner while he was on lunch break and again that afternoon. This confrontation was in retaliation for having made a request a few days before to be released from work to attend a EEO meeting in August 12, 1996.

Petitioner completed a eight hours in capsicum training and one half day course in fall of 1996. Everybody that took the eight hours course received a certificate. Avery Stichberry and Ricardo Weaver retrieved certificates from petitioner in retaliation of employment EEO complaints.

Petitioner was transferred to another museum June 23, 1997. The work environment and conditions were substantially different and adverse. Employer made the transfer because of the problems with the supervisors, that have retaliated with suspensions and restrictions of facilities use. Employer retained all other employees and also hired two temporary workers.

Petitioner seeks relief from the judgment of United States District Court for District of Columbia before the Honorable Gladys Kessler. The Order entered by the Court of Appeals for the District of Columbia before the Honorable Williams, Randolph, and Garland whose jurisdiction was conferred by Title 28 U.S.C. § 1291.

The Memorandum Opinion of the District of Columbia Court, and Order of the Appeals Court for District of Columbia, are inconsiderate of all facts, motives, of discrimination that Petitioner presented in evidence, and affidavits, and partly presented in this Petition. The Courts Opinion was not consistent with Title VII 42 U.S.C. 2000e-2 to 16 and the Constitution, F.R.C.P. 56(F) (App. 15-18)

REASON FOR GRANTING THE WRIT

WHETHER A GOVERNMENT WORKER MAY USE REASONABLE SPEECH ON THE JOB? IF IT IS PROTECTED BY THE CONSTITUTION AMENDMENT I?

The District Court Memorandum Opinion (App.3) and also Appeals Court did not consider any of the compelling reasons for speech on the job, and they are in conflict with the Constitution (App.15) Petitioner has stated that he has asked a question to determine if a visitor might understand something. He had a concern for proper behavior of that public individual. See e.g. *Perry v. Sinderman* 408 U.S. 593. (1972) at 2695, where a professor that protested the administration of a college, he was not rehired.

The District of Columbia Appeals court decision (App. 1) did not consider and is in conflict with relevant decisions, e.g. *Cox v. State of Louisiana* 379 U.S. 536 (1965) at 453) where a group assembled

and expressed their speech near a courthouse and were charged disturbing the peace; speech and free assembly had been infringed. e.g. *Terminiello v. City of Chicago* 337 U.S. 1. 69 S.Ct. 894 (1949) at 895, a speech was made in a auditorium which provoked the people outside to charge speaker with disorderly conduct. Conviction was reversed in favor of vitality of civil and political institutions in our society depends on free discussion.

WHETHER A GOVERNMENT WORKER MAY PHOTOGRAPH SOMETHING ON PUBLIC DISPLAY AND USE THAT FOR PERSONAL AND PUBLIC USE? IF IT IS PROTECTED BY THE CONSTITUTION AMENDMENT I?

The District of Columbia District Court Memorandum Opinion (App. 3) and also D.C. Appeals Court did not consider any of the compelling and material reasons for photographing something on public display. Petitioner photographed a few things so he could have for study and to make expressions to others in a social group. The D.C. District Court and Appeals Court are in conflict with Supreme Court and the Constitution (App. 15) and other Appeals Courts on this issue. e.g. *Winters v. People of State of New York* 333 U.S. 507 (1948) concluded at 509

> in that a failure of a statute limiting freedom of expression to give notice of what acts will be punished and such a statute's inclusion of prohibitions against expression, protected by the principles of the First Amendment violates an

accused's rights under procedural due process and freedom of speech or press.

e.g. *Lovell v. City of Griffin Ga.* 303 U.S. 444 (1938) at 669 where an individual was charged with violation of ordinance prohibiting distribution of literature; She claimed ordinance violated First and Fourteenth Amendments.

WHETHER A GOVERNMENT WORKER MAY USE A GOVERNMENT OWNED LIBRARY FACILITY DURING PUBLIC BUSINESS HOURS, IN ORDER TO READ ABOUT GOVERNMENT REGULATIONS ART INFORMATION, JOB DESCRIPTIONS, AND THINGS THAT ARE OF PUBLIC CONCERN AND USE THAT INFORMATION FOR PERSONAL AND PUBLIC USE? IF IT IS PROTECTED BY THE CONSTITUTION AMENDMENT I?

April 1997, Mr. Francer was reading in the library during his break period at Renwick Gallery. Mr. Francer was told to leave and at a latter date was notified by Ricardo Weaver he would propose to suspend for having used library, and did so in May 1997.

The District of Columbia District Court and Appeals Court (App. 1-14) did not consider any of the reasons for having used the library. Mr. Francer stated in his response affidavits to the courts that he was not using the library to lounge there nor to have meals. He stated that it was needed to acquire information about art and other things, like job descriptions. That information was to have been used for personal use

and to make expression to others about things of public concern.

D.C. District Court and Appeals Court are in disagreement with prior decisions made a half a century ago and more recently with U.S. Supreme Court and other courts, and the Constitution (App. 15) e.g. *Lovell v. City of Griffin Ga.* 303 U.S. 444, (1938) Id. 669, An ordinance is invalid, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. e.g. *Chester Collier v. Mary Lou Buchanan* 421 F.Supp. 869 (D.C. Mich. 1976) at 870 The prosecution of plaintiff for browsing through literature of questionable social value were alterations of legal status under state law and are valid claims under civil rights act. e.g. *Winters v. People of State of New York* 333 U.S. 507, 68 S.Ct. 665, (1948)

IN CONSIDERING THE REASONABLENESS OF SPEECH, PHOTOGRAPHING, AND READING; HOW THESE MIGHT BE RELATED TO TITLE VII OF U.S.C. 42 § 2000A, 2000E-2 TO 16, AND CONSTITUTIONAL ARTICLES AMENDMENTS I AND XIV? IF THE COURTS INTERPRETED THE LAWS PROPERLY? IF THERE ARE VIOLATIONS?

The District of Columbia District Court and D.C. Appeals Court did not adhere to established federal laws, previous decisions of the Supreme Court and the Constitution (App. 1-13 App. 15-18). The courts did not ascertain any of the material facts. When Mr. Francer claimed he was denied use for facilities at times and others weren't indicates favoritism and or retaliation

for some reason. Petitioner presented to the court that there was favoritism, and that he complained verbally and in writing. According to 42 U.S.C. 2000a (App. 15) all persons shall have equal access to goods and services. 42 U.S.C. 2000e-2 (App. 16) unlawful employment practices to include terms, conditions, or privileges, and under 2000e-2 (m) (App. 16) unlawful employment practice is established by explaining the motivating factors for any employment practice, even though other factors also motivated the practice. *Doris Daniel v. Euell Paul* 395 U.S. 298 (1969) Id. 319 Gentleman submitted for membership to a club and was refused, defendant made several excuses for denial. e.g. *Hishon v. King & Spaulding* 467 U.S. 69; 104 S.ct. 2229 (1984) Id. 2233

> Benefits that are part and parcel of the employment relationship may not be doled out in a discriminatory fashion even if employer would be free under employment contract simply not to provide the benefit at all.

Mr. Francer stated that he photographed a few things at the Renwick Gallery. Again he was suspended. It is assumed that recording a view onto a medium whether drawn or otherwise like a photograph is permitted by the Constitution Amendment I (App. 15). The abridgment of that is based on race demonstrated by facts of discharge and disparity relating to it.

Petitioner stated he used the Renwick's library in April 1997 to acquire some information about art, job descriptions and therefore was suspended. Petitioner was singled out and treated differently because of

restrictions and suspensions. He had a library card and was entitled to use library on same terms as others and the general public without card.

Petitioner presented evidence of job ratings disparity by showing that he received satisfactory work ratings before and after the time periods in question. He received improvement needed ratings in the period when the supervisor discriminating was in charge. He observed other workers not performing well and misbehaving on the job yet they received inflated ratings.

Petitioner presented evidence of mistreatment and adverse personnel actions. In addition August 9, 1996, he was assaulted during his lunch break in retaliation for a request to be released from work to attend EEO meeting August 12, 1996. His certificate of capsicum training was retrieved. And he was transferred to a substantially different and adverse job and location June 1997.

The courts have failed to apply 42 U.S.C. 2000e-2 to 16 and Constitutional Amendment Article XIV to this case. (App. 15-18) They were inconsistent with previous cases. (App. 1-14)

Petitioner has indicated that he was adversely affected by employer's personnel actions. He was suspended without just cause and discriminatorily for having used reasonable speech, photographing something, using the library. His privileges and conditions of the job were infringed and not consistent with others. His job ratings were inconsistent with true performance and that of others. He was mistreated by adverse personnel actions of certification and job transfer. The employer and supervisors have taken

actions against Petitioner for having made EEO complaints. There was a refusal of the courts to grant discovery and affidavits as permitted by Constitutional Amendment Article XIV (App. 15) (App. 13)

The suspensions from work are not consistent with the personnel actions to other workers for similar behavior. Courts are in conflict with *L. N. McDonald v. Santa Fe Trail* 427 U.S. 273 (1976) Id. 2575 where white workers were discharged for theft but minority workers weren't; the act of theft may warrant discharge, this criterion must be "applied alike to members of all races."

The suspensions, restrictions on photographing, use of library, revocation of capsicum certificate, deprived conditions, privileges, and terms of employment. See *Hishon v. King & Spalding* 467 U.S. 69: 104 Sct. 2229 (1984) Id. 2229. A benefit that is part and parcel of employment relationship even though it is not required by express or implied contract, may not be doled out in a discriminatory way.

The mistreatment and assault August 1996 for request to attend a legal meeting, and the job transfer to an adverse location were examples of retaliation and discrimination for employment complaints made. e.g. *McDonnell Douglas Co. v. Green* 411 U.S. 792 (1973) at 668 Defendant had reasonable cause to a claim of employer retaliation for his EEO protests.

The court inferred (App. 8) that Petitioner wasn't affected adversely and treated differently. It also stated that an adverse personnel action must have resulted in a tangible employment action, defined as a "significant" change in employment status. In 42

U.S.C. 2000e-2 to 16 (App. 16-18) there are no such words as "significant." And "tangible."

See, *Sandra Bundy v. Jackson* 205 U.S. App. D.C. 444 (1981) at 445, subject was entitled to relief regardless of whether plaintiff lost any tangible job benefits with respects to terms, conditions, or privileges, despite employer's claim of poor work performance Id. 451.

See, e.g., *Karl Parker v. The Baltimore and Ohio Raíl Road Co.* 652 F 2d. D.C. Cir. 1012 (1981) at 1019, Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against any employee either "because he has opposed any practice made an unlawful employment practice" under Title VII or "because he has made a change, testified, assisted or participated in an investigation, proceeding, or hearing."

See, e.g., *Paulette Barnes v. Costle* 561 F 2d. 983 (D.C. Cir. 1977) at 993, Title VII claim is valid even though less than all employees of claimant's gender are affected, and "a single instance of discrimination may form the basis of a private suit."

See, e.g., *Faragher v. City of Boca Raton* 118 U.S. 2275 (1998) at 2275. An employer is subject to vicarious liability to a victimized employee for actionable discrimination caused by a supervisor and also for failure to exercise reasonable care to prevent harassing behavior.

District of Columbia District Court failed to consider background circumstances for 42 U.S.C. 2000e-2 (m) The motives of employer in making poor job evaluations. (App. 16) (App. 8-9). The evaluations alone would not prove anything, except that job evaluations before and after the time in question were

satisfactory. If work performance would have been compared to others, the standard would be satisfactory. Employer had motive of overlooking other workers misbehavior, and poor work performance and assigning inflated ratings. e.g. *Segar v. Civilette* 508 F. Supp. 690 (1981) D.C. Cir.) at 1264 Agents work evaluations were "speculative and incapable of rebutting plaintiffs' statistical showing." See, e.g., *Stroller v. Marsh* 682 F. 2d 971 (D.C. Cir 1982) at 972 an unfavorable employment decision resulting from inaccurate, discriminatorily motivated evaluations by the employee's supervisors violates Title VII.

District of Columbia District Court has refused to allow pretrial discovery motions and affidavits permitted by F.R.C.P. _____56F, (App. 18) and deprived rights of Constitution Amendment Article XIV (App. 15). The Appeals Court of D.C. has departed from the accepted usual course of judicial proceedings and sanctioned such a departure by the lower court (App. 1).

CONCLUSION

WHEREFORE, based on the above cited precedents and arguments, and for each of the foregoing reasons. The petitioner respectfully submits that this Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the District of Columbia.

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Index To The Appendix

Court's Opinion, Joseph Francer v. Lawrence M. Small, Secretary, Smithsonian, et. Al. Case 00-5383; United States Court of Appeals, Washington, D.C., March 15, 2001 ....App. 1

Judgment, Judge Francer v. I. Michael Heyman, Secretary, Smithsonian, et. Al., Case 98-2979. United States District Court for the District of Columbia, August 28, 2000 ....App. 3

Order, denying Petition for Rehearing or Rehearing En Banc, United States Court of Appeals for the District of Columbia, May 25, 2001 ....App. 12

Order, denying motion for leave to take discovery, United States District Court for the District of Columbia, January 27, 2000 .... App. 13

Constitutional and Statutory Provisions ....App. 15

App. 1

United States Court of Appeals
For The District of Columbia Circuit

No. 00-5383 **September Term, 2000**
98cv02979

File On: Mar. 15, 2001
UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT

Joseph Francer,
Appellant

v.

Lawrence M. Small, Secretary of the Smithsonian, et al.,
Appellees

BEFORE: Williams, Randolph, and Garland, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the response thereto, and the reply; and the motion for leave to file a sur-reply, and the lodged sur-reply, it is

ORDERED that the motion for leave to file a sur-reply be denied. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987)(per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.)(per curiam), cert. denied, 449 U.S. 994 (1980). The district court's decision as to appellant's discrimination claims under Title VII is summarily affirmed substantially for the reasons stated by the district court in its memorandum opinion filed August 29, 2000. With respect to appellant's retaliation claims, summary judgment was warranted because, considering all the evidence in its full context, appellant has failed to present sufficient evidence from which a reasonable jury could conclude that appellee's actions were the result of retaliation. See Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1290 (D.C. Cir. 1998)(en banc),

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

Williams
Randolph
Garland

App. 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 98-2979 (GK)

JOSEPH FRANCER,	)	
Plaintiff,	)	
	)	FILED
v.	)	AUG 29 2000
	)	NANCY MAYER
I. MICHAEL HEYMAN,	)	WHITTINGTON,
Defendant.	)	CLERK U.S.
	)	DISTRICT COURT

MEMORANDUM OPINION

Plaintiff Joseph Francer, proceeding pro se in this matter, brings this suit against his employer, I. Michael Heyman, in his official capacity as Secretary of the Smithsonian Institution ("Smithsonian"), under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., for race discrimination and retaliation. This matter is before the Court on Defendant's Motion for Summary Judgment [#23]. Upon consideration of Defendant's Motion, Plaintiff's Opposition, Defendant's Reply, and the entire record herein, for the reasons discussed below, Defendant's Motion for Summary Judgment is **granted**, and this case is **dismissed**.

I. Background[1]

Plaintiff Joseph Francer, who is Caucasian, is a Museum Protection Officer with the Smithsonian Institution.

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[1] Summary judgment may be granted only when there is no genuine issue as to any material fact and the moving party entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c). Consequently, unless otherwise noted, the Court states only uncontroverted facts.

He was assigned to the Renwick Gallery prior to June 1997, and to the Museum of Natural History since June 1997. All the incidents in question occurred during his assignment to the Renwick Gallery.

On April 3, 1996, Plaintiff had an incident with a museum visitor that led to the visitor filing a complaint against him. The incident involved a child lying on the floor, to which Plaintiff responded by requesting that the child get up from the floor and sit on the bench. When the visitor replied that the child was not violating any rule, Plaintiff responded that the visitors must be immigrants, since they don't know the rules. On May 29, 1996, Captain Lawrence E. Chatman issued a decision suspending Plaintiff for five days in relation to this incident.

Plaintiff alleges that Sergeant Ricardo Weaver, who is African American and was Plaintiff's supervisor, assaulted him on August 9, 1996 because he had made an appointment with the Smithsonian's Equal Employment Opportunity ("EEO") Office. Defendant alleges that Plaintiff was attempting to provoke Sergeant Weaver into a physical confrontation.

On August 22, 1996, Plaintiff filed his first EEO Complaint with the Smithsonian's EEO Office. Lieutenant Avery Stichberry provided an affidavit relating to this complaint on October 15, 1997.

On August 28, 1996, Plaintiff took photographs of an exhibit at the Renwick Gallery, despite the sign displayed at the Gallery prohibiting photography. The officer on duty instructed Plaintiff not to take photographs, but Plaintiff did so anyhow. Sergeant Weaver recommended that Plaintiff be suspended ten days for violating the Gallery's rules, and for another incident of alleged rudeness to a visitor. Lieutenant Stichberry, who is Caucasian, imposed a seven day suspension.

In the fall of 1996, Plaintiff attended a training course for revolver and oleoresin capsicum use, which Officer Will Gunn (another Smithsonian employee, who is also Caucasian) also attended. Certificate cards were issued to Plaintiff and Officer Gunn, but were then retrieved by Sergeant Weaver, allegedly because the training course was only a "refresher" course, which did not certify for capsicum.

Plaintiff received performance ratings of "Improvement Needed" for the two evaluation periods spanning April 1, 1995 to March 31, 1997.

On May 13, 1997, Lieutenant Stichberry imposed a ten day suspension against Plaintiff for using the Gallery's library as a break room.

II. Analysis

Summary judgment will be granted when the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits or declarations, show that there is no genuine issue as to

any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A fact is "material" if it might affect the outcome of the action under the governing law. Anderson v. Liberty Lobby, Inc. 477 U.S. 242 (1986). The party seeking summary judgment bears the initial burden of demonstrating an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

In determining whether the movant has met this burden, a court must consider all factual inferences in the light most favorable to the non-moving party. McKinney v. Dole, 765 F.2d 1129, 1135 (D.C. Cir. 1985). Once the moving party makes its initial showing, however, the nonmoving party must demonstrate "specific facts that there is a genuine issue for trial." Celotex, 477 U.S. at 324; McKinney, 765 F.2d at 1135.

In discrimination cases, the Supreme Court has established a burden-shifting framework for analyzing the requirements each party must fulfill to sustain a claim or defense. See McDonnell-Douglas Corp. V. Green, 411 U.S. 792, 802-05 (1973); Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1288-89 (D.C. Cir 1998). The McDonnell-Douglas framework requires that the plaintiff first established a prima facie case of prohibited discrimination. See Aka, 156 F.3d at 1288. A prima facie case must be made by showing: (1) Plaintiff is a member of a protected class; (2) he was otherwise qualified to perform his duties; (3) he suffered an adverse personnel action; and (4) he was treated differently from other similarly situated employees who are not members of the protected class. Id. To make a prima facie case of reprisal, Plaintiff must show

that: (1) he engaged in EEO-protected activity and Defendant had knowledge of that activity; (2) he was subject to an adverse employment action, and (3) there is a casual connection between the protected activity and the adverse action. Thomas v. National Football League Players Ass'n, 131 F.3d 198, 202 (D.C. Cir. 1997). Furthermore, the D.C. Circuit Court of Appeals "requires a white plaintiff to show additional 'background circumstances [that] support the suspicion that the defendant is that unusual employer who discriminates against the majority.'" Harding v. Gray, 9 F.3d 150, 153 (D.C. Cir. 1993).

Once the plaintiff establishes a prima facie case, the defendant is afforded the opportunity to articulate a legitimate, nondiscriminatory reason for the alleged discrimination. Aka, 156 F.3d at 1288. If defendant provides a nondiscriminatory reason for the adverse action, the burden shifts back to the plaintiff, who must prove that the articulated reason is merely a pretext. Id. The ultimate burden of proving discrimination always remains with the plaintiff. Id. At 1289.

A. Race Discrimination

Plaintiff makes the following allegations of race discrimination in his Complaint: (1) that he was denied use of the drinking fountain, office telephone, and restroom, even though similarly situated minority employees were treated differently; (2) that his supervisor, Sergeant Weaver, placed a false statement in his personnel file concerning a museum visitor, which statement was used to suspend him; (3) that Sergeant Weaver falsely accused him of illegally photographing pictures in the Renwick Gallery, which led to a suspension; (4) that he received poor

performance appraisals for the evaluation periods spanning April 1, 1995, to March 31, 1997; and (5) that his training certificate from his capsicum training was withdrawn.

The first two elements of Plaintiff's prima facie case (that he is a member of a protected class and was otherwise qualified to perform his duties) are not challenged here. Defendants argue, however, that Plaintiff has failed to make a prima facie case regarding the second two elements (that he suffered an adverse personnel action and was treated differently from other similarly situated non-Caucasian employees), and that even if he has made out those two elements, Plaintiff has failed to rebut Defendant's legitimate non-discriminatory reason for the actions.

In a recent decision, the D.C. Circuit Court of Appeals held that an adverse personnel action must have resulted in a tangible employment action, defined as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Brown v. Brody, 199 F.3d 446, 456 (D.C. Cir. 1999).

In the instant case, Plaintiff has failed to offer any evidence of disparate treatment with respect to his first allegation; he only claims that he was denied use of the drinking fountain, office telephone, and restroom, but does not show or explain how other employees were treated differently. With respect to Plaintiff's fifth allegation, he not only fails to allege or show disparate treatment, but fails to show how this is a tangible employment action. Plaintiff's fourth allegation, of poor evaluations from his supervisor, is directly

addressed in Brody, where the District of Columbia Circuit held that poor evaluations, without more, do not constitute tangible employment actions. Brody, 199 F.3d at 458. Thus summary judgment must be granted in favor of Defendants on these claims.

The second and third allegations Plaintiff makes do have tangible employment effects, and constitute adverse personnel actions. Plaintiff has thus made a prima facie case as to these two allegations. Defendant offers in response the non-discriminatory reason that Plaintiff was not treated any differently than other employees with respect to the visitor complaints, the photographing incident, or the suspensions. Defendant notes that the policies in place regarding behavior towards visitors and photographing of exhibits were applied equally to all employees.

In response, Plaintiff does not offer any evidence to show that material facts are in issue with respect to these incidents, or that Defendant's non-discriminatory reasons are pretextual. See Aka, 156 F.3d at 1288. Furthermore, Plaintiff has shown no "additional 'background circumstances [that] support the suspicion that the defendant is that unusual employer who discriminates against the majority.'" Harding, 9 F.3d at 153. Instead, Plaintiff's opposition is full of conclusory statements and allegations, many of which are irrelevant to the instant case (such as the fact that "[Lieutenant] Stichberry is married to an oriental [sic] woman," Pl.'s Opp'n at 7). Conclusory allegations are not sufficient to survive a motion for summary judgment; Plaintiff must demonstrate "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324; McKinney, 765 F.2d at 1135.

Consequently, summary judgment must be granted in favor of Defendant on Plaintiff's claims of race discrimination.

B. Retaliation

Plaintiff also alleges that he was retaliated against for his EEO activities when Sergeant Weaver assaulted him for making an appointment with the Smithsonian's EEO office, when he was suspended from using the library at the Gallery, and when he was transferred to a more difficult work area in June 1997 (the Museum of Natural History).

Brody specifically addresses this last claim, holding that a lateral transfer, without any change in employment status or benefits, does not constitute an adverse employment action. Brody, 199 F.3d at 457. Since Plaintiff does not even allege that his employment status or benefits changed due to the transfer, he has not even made out a prima facie case of retaliation for this claim.

Furthermore, Brody also addresses Plaintiff's allegation of retaliation for failure to allege how this action resulted in any tangible change in his employment action. Consequently, he has not made out a prima facie case of retaliation on this claim as well.

With respect to the allegation of assault by Sergeant weaver, Plaintiff contends that Weaver assaulted him in connection with his making an appointment with the Smithsonian's EEO office. However, in an affidavit signed by Plaintiff and submitted by the Government, Plaintiff makes no allegation that the alleged assault was due to any retaliation for EEO activity; in fact, in that affidavit,

Plaintiff makes no mention at all of the possible reason for Weaver's alleged assault. Def.'s Ex. 1 at 6. Plaintiff offers no evidence, aside from his bare allegations and conclusions, to show that Weaver's alleged assault was motivated by retaliation for his EEO appointment. It is well established that "a party may not create a material issue of fact simply by contradicting prior sworn testimony." Pyramid Sec. Ltd. v. IB Resolution, Inc., 924 F.2d 1114, 1123 (D.C. Cir. 1991), cert. denied, 502 U.S. 822 (1991). Consequently, summary judgment will be granted for Defendant on Plaintiff's claim of retaliation.

II. Conclusion

For reasons discussed above, Defendant's Motion for Summary Judgment [#23] is **granted**, and this case is **dismissed.** An order will issue with this opinion.

August 28, 2000
Date

/S/Gladys Kessler
Gladys Kessler
United States District Judge

App. 12

United States Court of Appeals
For The District of Columbia Circuit

No. 00-5383 **September Term, 2000**
98cv02979

Filed On: May 25, 2001
UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA COURT

Joseph Francer,
Appellant

v.

Lawrence M. Small, Secretary
of the Smithsonian, et al.,
Appellees

BEFORE: Williams, Randolph and Garland, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed April 25, 2001, it is **ORDERED** that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
/S/ Robert A. Bonner
Deputy Clerk

App. 13

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 98-2979 (GK)

JOSEPH FRANCER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
I. MICHAEL HEYMAN	)	**Filed Jan. 27, 2000**
	)	**Nancy M. Whittington**
Defendant.	)	**Clerk, U.S. District Court**
	)	

ORDER

This matter comes before the Court on Plaintiff's motion for leave to take depositions. Since discovery is stayed pending a ruling on the dispositive motions, see Scheduling Order of April 30, 1999 at 2, Plaintiff is not entitled to take depositions at this time. Accordingly, it is this 24th day of January 2000, hereby

ORDERED THAT Plaintiff's Motion is **denied**.

/S/ Gladys Kessler
Gladys Kessler
U.S. District Judge

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Lydia K. Griggsby
U.S. Attorney's Office
Judiciary Center Building
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Constitutional and Statutory Provisions
Constitution of the United States

Article I. Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article XIV Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title VII of
42 U.S.C. § 2000a. Prohibition Against Discrimination or Segregation in Places of Public Accommodation

(a) Equal access

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

42 U.S.C. § 2000e-2 Unlawful Employment Practices

(a) Employer Practices

It shall by an unlawful employment practice for an employer- (1.) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2.) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(M.) Impermissible Consideration of Race, Color, Religion, Sex, or National Origin in Employment Practices-

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, and national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-3 Other Unlawful Employment Practices

(A.) Discrimination for Making Charges, Testifying, Assisting, or Participating in Enforcement Proceedings.

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency or joint labor management committee controlling apprenticeship or other training or retraining, including on the job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-16 Employment by Federal Government

(A) Discriminatory Practices Prohibited; Employees or Applicants for Employment Subject to Coverage.

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government

having positions in the competitive service, and in the Library of congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Federal Rules of Civil Procedure 56F States in Relevant Part:

> Should it appear from the affidavit of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition. The court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.